E L L S B E R G - R U S S O D E F E N S E

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FOR IMMEDIATE RELEASE:

Russo Asks Court To Dismiss Indictment For Bad Faith Prosecutorial Misconduct

In response to the Government's motion for inquiry to identify the alleged violator of the Court's protective order, attorneys for Anthony Russo today asked Judge Wm. Matthew Byrne, Jr. to dismiss the indictment for "bad faith prosecutorial misconduct."

A copy of Mr. Russo's motion is attached:

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG, Defendants.	No. 9373-(WMB)-CD DEFENDANT'S OPPOSITION TO GOVERNMENT'S MOTION FOR INQUIRY TO IDENTIFY (ALLEGED) VIOLATOR OF COURT ORDER; AND DEFENDANT'S MOTION TO DISMISS OR TO GRANT OTHER APPROPRIATE RELIEF FOR BAD FAITH PROSECUTORIAL MISCONDUCT.

Defendant ANTHONY J. RUSSO, JR., hereby opposes the Government's motion for inquiry to identify (alleged) violator of court order, and further hereby moves the Court for an order dismissing the indictment in the above entitled case, or granting other appropriate relief, pursuant to Rule 12, Federal Rules of Criminal Procedure, on the grounds of bad faith prosecutorial misconduct by the government, resulting in adverse and prejudicial publicity to defendant and thereby denying him his right to a fair trial.

In its motion served upon defendants on June 22, 1972, approximately two weeks before the trial was scheduled to begin, and made available through court records to local, national and international news media, the government blatantly and with admittedly absolutely no factual foundation accused members of the defense of violations of several criminal felony statutes and of the Court's protective order, stating that there is "a high likelihood,

if not a certainty," that members of the defense committed the crimes in question.

The total and complete absence of any fact or facts which would even lean in the direction of indicating any such misconduct by members of the defense makes it clear that the government has failed to and indeed never intended to, establish grounds for the actions it requests the Court to take. While the relief sought by the government should therefore be denied in its entirety without the need for further explication, the harm dealt the defendants calls for close judicial scrutiny.

The totally unfounded nature of the government's accusations, combined with the highly prejudicial manner in which it raised them, leads inexorably to the conclusion that the government has purposefully and vindictively chosen to attack the defendants for the purpose of attempting to deprive them of their right to a fair trial. In so doing, the government has engaged in the worst sort of prosecutorial misconduct, using the high office of the United States Attorney to set forth "improper suggestions, insinuations and especially, assertions of personal knowledge [which] are apt to carry much weight against the accused when they should properly carry none." Berger v. United States, 295 U.S. 78, 88(1935). In Berger, where the Court reversed the conviction due to the improper conduct of the United States Attorney, the Court recognized the peculiar position of the prosecutor and the responsibility which should accompany it:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar

> and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Berger, supra, at 88 (emphasis added)

The doctrine of Berger, guaranteeing for the defendant in a criminal action a "fair prosecutor," has been followed by a long line of subsequent cases, and indeed has become an important part of the Code of Professional Responsibility of the American Bar Association, which in Ethical Consideration 7-13, under Canon 7, states that: "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."

The courts have repeatedly recognized the adverse effect prejudicial pre-trial publicity can have on the defendant's right to a fair trial, just as they have addressed themselves to the problem of in court misconduct by the prosecutor. In Rideau v. Louisiana, 1963, 373 U.S. 723, the United States Supreme Court held that adverse publicity before trial could just as easily deprive a defendant of a fair trial as publicity during trial. And in Estes v. Texas, 381 U.S. 532, at p. 536, the Court observed:

> "Pretrial [publicity] can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence."

The inherent unfairness of governmental pronouncements concerning a pending criminal charge was analyzed recently in United States ex rel. Rosenberg v. Mancusi, 445 F. 2d 613, 617 (2nd Cir. 1971) where the Court commented:

> "Not only do official statements engender a greater reliance by the public as to the credibility of the officers making the statements, but they also suggest an official disregard of safeguards inherent in a fair trial."

Closer in point, the Fourth Circuit, in United States v. Milanovich, 303 F.2d 626, 630 (4th Cir. 1962) declared:

> "A prosecutor who supplies a radio station with adverse information to be disseminated about a defendant on the eve of trial commits a gross violation of professional propriety meriting severe condemnation."

See also: Henslee v. United States, 246 F.2d 190, 193 (5th Cir. 1957), involving misconduct by the prosecutor in filing an inflammatory motion in a collateral proceeding during the trial of a criminal case; and Briggs v. United States, 221 F.2d 636 (5th Cir. 1955), where a judge issued bench warrants for the arrest of two witnesses on charges of perjury during the trial of a criminal matter, resulting in attendant publicity necessitating a reversal of a conviction.

The important point to be noted in Briggs, supra, is that the impropriety in the action was in allowing it to potentially affect the outcome of the trial by prejudicing the jury.

As in Briggs, and the instant case, there were avenues open which would not have raised the risk of prejudice. In the present prosecution, the Assistant United States Attorney could have raised the matter in chambers, or could have raised it at the close

of the trial. Instead, he chose to follow the course calculated to lead to the greatest possible harm to the defendants' chances for a fair trial.

In Sheppard v. Maxwell, 384 U.S. 333(1966), the Supreme Court dealt with publicity in a case which, as with the instant case, had generated a tremendous amount of press coverage. Within this context, the prosecution made inadmissible evidence available to the press and thereby the jury, just as in the instant case the prosecutor's misconduct has reached the potential jurors. (See attached exhibits of newspaper articles publicizing the government's accusations, and attached Exhibit "E" which, along with at least one other wire service release, served as the basis for extensive radio coverage of the story in the Los Angeles area). The result in Sheppard was that the Supreme Court refused to allow the conviction to stand.

The courts have thus clearly expressed the requirement of high standards on the part of the prosecutor in pursuing criminal cases, even though still, in the words of Dean Pound, "[w]e must go back to the seventeenth century--to the trial of Raleigh or to the prosecution under Jeffreys--to find parallels for the abuse and disregard of forensic propriety [by the public prosecutor] which threatens to become staple in American prosecutions." R. Pound, Criminal Justice in America, p. 187(1930).

In reversing a conviction due to the prosecutor's failure, or refusal, to meet these standards, the Court in Hall v. United States, 419 F.2d 582, 583-4(5th Cir. 1969) stated that the prosecutor had "great potential for jury persuasion," that "his role as a spokesman for the government tends to give to what he says the ring of authenticity. The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says...."

This power of the prosecutor, as a person of considerable

influence in the community and the representative of the government, which lends "weight and importance to his utterances," led the court in Latham v. United States, 226 F. 420(5th Cir. 1915) to stress the harm that can result from his improper statements:

> "He does not occupy the position of a defendant's counsel, but appears before the jury clothed in official raiment, discharging an official duty. The realization of these considerations should lead the officer to exercise of the utmost care and caution in making statements before the jury, and should induce him to confine his arguments and statements to the testimony of the witnesses, in order that no right of the defendant is violated."

There has even been a strong position taken that there need not be a showing of prejudice resulting from the misconduct of the prosecutor. In Nash v. Illinois, 389 U.S. 906(1967), denying a petition for certiorari, Mr. Justice Fortas, joined by the Chief Justice and Mr. Justice Douglas, dissented:

> "[I]t is by no means clear that petitioner must show the prosecutor's knowing acquiesence in a material falsehood prejudiced him. There is no place in our system of criminal justice for prosecutorial misconduct. (citations omitted)."

In the instant case, the misconduct by the prosecutor is even more egregious and more obviously in bad faith.[1/] than any

1/ Although it should be noted that bad faith on the part of the prosecutor is not a prerequisite to relief by the court, as stated by the Third Circuit in United States v. Nettl, 121 F.2d 927, 930 (3rd Cir. 1941):

> "It is true that some of the authorities make the curious suggestion that the matter is affected by a subjective standard applied to the District Attorney.

of the cases previously cited. The United States Attorney is well aware of the long established and judicially sanctioned procedures for accusing persons of public crimes and for instituting investigations against them. Rather than follow these procedures, and apprarently in part because it was aware that there was not a shred of evidence to sustain such action, the government chose to make use of court pleadings in a pending criminal action, and in fact at a time less than two weeks from the date set for commencement of the selection of the jury in that action, to publicly charge not only defendants, but also their lawyers and potential witnesses, with new and different felonious crimes. It is submitted that this is exactly the extreme example the Court was referring to by its statement in United States v. Grassia, 354 F.2d 27, 29 (2d Cir. 1965), that a situation could exist "where the government's conduct in generating publicity has been so egregious and the prejudice engendered by it so pervasive, cf. Irwin v. Doud, 366 U.S. 717, that the drastic sanction of dismissing the indictment would be demanded..."

In pursuing this course of conduct, the government prosecutors were employing unfounded accusations beyond the scope of the charges set forth in the present indictment for the purpose and with the effect of causing potential jurors to believe there to be a higher liklihood that the charges in the present indictment are well founded. Such actions by prosecutors have consistently been rejected by the courts, and have been considered grounds for

(1/cont) We cannot understand how the accused is interested in the personal character of his accuser. The prosecutor may be disciplined. But it hurts the defendant just as much to have prejudicial blasts come from the trumpet of Gabrial."

See also: Griffin v. United States, 183 F.2d 990 (D.C. Cir. 1950); United States v. Sprengel, 103 F.2d 876 (3rd. Cir. 1939).

reversal, especially when the accusations are wholly the creation of the prosecutors and are based on no actual evidence.

Thus, in Snipes v. United States, 230 F.2d 165 (6th Cir. 1956), where the prosecutor said he could bring thirty or forty counts rather than the one before the court, the conviction was reversed. And similarly, where the prosecutor admitted that the sum in question in the particular indictment was small, but hinted that the case, concerned only with fuel oil aspects of defendant's huge petroleum products industry, was only one corner of a huge criminal plot, the conviction was reversed. Wagner v. United States, 263 F. 2d 877 (5th Cir. 1959). See also Kitchell v. United States, 354 F. 2d 715 (1st Cir. 1965), wherethe court held that "remarks as to the availability of unused evidence are clearly unpermissible." And where, rather than a hint or an inference, as above, the prosecutor makes express reference to crucial alleged facts outside of the record, reversible error even more clearly results. Taliaferro v. United States, 47 F.2d 699 (9th Cir. 1931).

The strongest "support," for its irresponsible accusations, which the government appears to be able to produce is the statement that "(s)everal leading antiwar activists" are serving as consultants to defendant Russo.[2/] This attempted character assassination is reminiscent of the attempted "gag order" by the trial court in Chase v. Robson, 435 F2d 1059 (7th Cir. 1970) on the ground, inter alia, that one of the defense attorneys had been co-counsel with William Kunstler in a previous trial. Fortunately for the integrity of the judicial system, the Court of Appeals overturned the order and rejected the grounds upon which it was based.

If the United States Attorney's Office, and its investigative

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2/ The government fails even here, since not only the consultants, but the entire Russo defense team are anti-war activists, and maintain that the crime is with those who are not.

agencies, were truly interested in discovering the source of the alleged "leak," the obvious place to begin has been pointed out to them by defendants' motion for dismissal based on selective prosecution, with its attached affidavits clearly demonstrating that the practice of leaking information to the press is a standard one among government officials themselves, and has been for some time.

While the Assistant United States Attorney has expressed his confidence that the documents in his possession have not "been compromised," he evidently has not turned his attention towards the halls of Congress or the back rooms of the White House and the executive departments. The reasons appear obvious.

CONCLUSION

The government has never had the intention of legitimately seeking to discover the alleged "leak." Its motive from the start, as is made obvious from the tenor of its moving papers, has been to obtain in camera information and to create adverse pre-trial publicity against the defendants.

For the foregoing reasons, it is respectfully submitted that the governments motion should be denied and that the indictment against defendant Russo should be dismissed.

Respectfully submitted,

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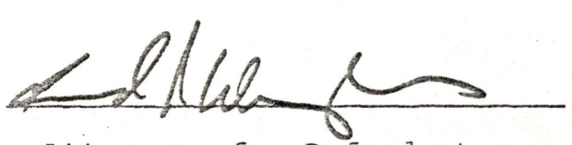
By: 

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